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Workers' Compensation - Suspension Status to Reinstatement of Disability Benefits - Claimant's Burden of Proof

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WORKERS' COMPENSATION—SUSPENSION STATUS TO REINSTATEMENT OF DISABILITY BENEFITS—CLAIMANT'S BURDEN OF PROOF—The Supreme Court of Pennsylvania held that a claimant need not supply expert medical evidence to establish that a work-related injury continues; instead, once a claimant testifies that a work-related injury continues, the burden of proof shifts to the employer to prove the contrary.

Latta v. Workmen's Compensation Appeal Board (Latrobe Die Casting Co.), 642 A.2d 1083 (Pa. 1994).

John Latta (the "Appellant") suffered a work-related injury to his right arm while employed at Latrobe Die Casting Co. (the "Employer").[1] Pursuant to the Pennsylvania Workers' Compensation Act (the "Act"),[2] the Appellant was paid workers' compensation benefits for total disability.[3] Subsequently, he returned to work in a light-duty capacity[4] and his workers' compensation

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1. Latta v. Workmen's Compensation Appeal Board (Latrobe Die Casting Co.), 642 A.2d 1083, 1083 (Pa. 1994). The injury occurred on March 24, 1977. *Latta*, 642 A.2d at 1083.

2. PA. STAT. ANN. tit. 77, §§ 1-1603 (1992 & Supp. 1994). Employers are liable for compensation for personal injuries to their employees provided that the injury occurred in the course of employment, without regard to the negligence or fault of the employer or employee. PA. STAT. ANN. tit. 77, § 431. An employee may present a claim petition for compensation to the Department of Labor and Industry, if the employer and employee or the insurer and the employee fail to agree upon the facts of the work-related injury or upon the compensation due under the Workers' Compensation Act. *Id.* § 751.

3. *Latta*, 642 A.2d at 1083. A claimant is paid total disability benefits when it is proved that the claimant is "unable to compete for employment on the open labor market." ALEXANDER F. BARBIERI, PENNSYLVANIA WORKMEN'S COMPENSATION AND OCCUPATIONAL DISEASE § 5.14 at 38 (1975). A claimant is also paid total disability benefits when the claimant proves an inability to perform his pre-injury duties coupled with the employer's subsequent inability, after the burden of proof shifts to the employer, to prove the availability of light work which the claimant is capable of performing. *See* Barrett v. Otis Elevator Co., 246 A.2d 668, 674 (Pa. 1968). Total disability is not defined in the Act, but the Act does provide that an employee is entitled to 66.67% the employee's wages, as defined under section 309 of the Act, for total disability. PA. STAT. ANN. tit. 77, § 511. If, after calculating the benefit in the above manner, the benefit is less than 50% of the statewide average weekly wage, then the benefit that is payable is calculated to be the lower of 50% of the statewide average weekly wage or 90% of the claimant's average weekly wage. *Id.*

4. *Latta*, 642 A.2d at 1083. A light-duty job is a position within the claimant's medical restrictions. *See* General Dynamics Land Systems, Inc. v.

benefits were accordingly modified to reflect partial disability.[5] Thereafter, benefits were paid to the Appellant according to various supplemental agreements.[6] The final supplemental agreement provided that the Appellant was entitled to partial disability compensation for a fixed three-month period.[7] Prior to the expiration of the final supplemental agreement, the work force at Latrobe Die Casting Company went on strike.[8] After the strike, the Employer reduced the work force and the Appellant's employment was terminated due to his lack of seniority.[9]

The Appellant then filed a petition to reinstate his benefits as of the date the strike commenced.[10] The referee[11] held that the Appellant had not sustained his burden of proving that he was absent from work due to a work-related injury.[12] As a result,

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Workmen's Compensation Appeal Board (Shnipes), 631 A.2d 728, 729 (Pa. Commw. Ct. 1993). A light-duty position has also been described as a position specially created by the employer which is light of effort and responsibility as well as laden with rest and comfort. *See* BARBIERI, cited at note 3, § 5.14(1) at 39.

5. *Latta*, 642 A.2d at 1083. A claimant, receiving total disability compensation, who returns to work in a light-duty capacity, will have his benefits modified to reflect the change in earning power. *See* PA. STAT. ANN. tit. 77, § 512. Partial disability includes any disability which is less than total disability and is measured by loss of earning power. *Id.* Partial disability benefits are paid at a rate equal to 66.67% of the difference between the wages of the injured claimant, as provided by section 309 of the Act and the earning power of the claimant subsequent to the injury. *Id.*

6. *Latta*, 642 A.2d at 1083. A supplemental agreement is an agreement between the parties, as to modification of benefits, relating to the claimant's change in compensation status. PA. STAT. ANN. tit. 77, § 732.

7. Latta v. Workmen's Compensation Appeal Board (Latrobe Die Casting Company), 510 A.2d 896, 897 (Pa. Commw. Ct. 1986), *allocatur denied*, 522 A.2d 1106 (1987). According to the final supplemental agreement, the Appellant was entitled to partial disability compensation between September 4, 1979 and December 4, 1979. *Latta*, 510 A.2d at 897.

The final supplemental agreement also provided that the Appellant's compensation benefits would be effectively suspended at the end of the fixed three-month period as a result of an "undetermined partial disability not reflected in the loss of wage." *Latta*, 510 A.2d at 897. An employer may suspend compensation when an employee has returned to work at his prior or increased earnings, whereby the employee's disability would not be reflected in the loss of wage. PA. STAT. ANN. tit. 77, § 774.2.

8. *Latta*, 642 A.2d at 1084. The Appellant and his fellow employees went on strike on October 20, 1979. *Id.*

9. *Id.* The duration of the Appellant's employment was not mentioned in the opinion.

10. *Id.* A claimant may petition to reinstate benefits, previously under suspension, where the claimant's earning power is once again adversely affected by the disability. PA. STAT. ANN. tit. 77, § 772.

11. *Latta*, 642 A.2d at 1084. The referee, now called a Workers' Compensation Judge for the Department of Labor and Industry, is appointed by the Secretary of Labor and Industry to hold departmental hearings under the Workers' Compensation Act. PA. STAT. ANN. tit. 77, § 701.

12. *Latta*, 642 A.2d at 1084. The referee noted that initially the Appellant had

the referee denied the Appellant's reinstatement petition and his benefits remained suspended.[13] The Appellant then appealed the referee's adverse order to the Workmen's Compensation Appeal Board (the "Board").[14]

The Board, in affirming the decision of the referee, held that the Appellant had not proven that he had any disability attributable to a work-related injury.[15] The Board asserted that the Appellant could not satisfy his burden of proof by simply showing that he was no longer working.[16] Subsequently, the Appellant appealed to the Commonwealth Court of Pennsylvania,[17] which affirmed in part and reversed in part the decision of the Board.[18] The commonwealth court reversed the Board's decision and allowed disability benefits with respect to the time period already covered by the final supplemental agreement, however, the commonwealth court affirmed the Board's decision and denied disability benefits with respect to the time period subsequent to the expiration of the final supplemental agreement.[19] The Appellant's petition for allocatur was then denied by the Supreme Court of Pennsylvania.[20]

The Appellant filed a second reinstatement petition alleging that he was entitled to total disability benefits beginning January 5, 1980.[21] The Appellant's physician testified that the Ap-

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voluntarily removed himself from employment by participating in the strike and subsequently was not employed due to the reduction in the work force. *Id.*

13. *Id.*

14. *Id.* The Workmen's Compensation Appeal Board is a departmental administrative board which acts as an appellate board independent of the Secretary of Labor and Industry and any other official of the Department of Labor and Industry. *See* PA. STAT. ANN. tit. 77, § 701. Referees' decisions are appealed to the Board. *Id.* § 853.

15. Opinion, *Latta v. Latrobe Die Casting Co.*, A-85914, W.C.A.B. (1984).

16. *Id.*

17. *Latta*, 642 A.2d at 1084. Decisions of the Board are appealed to the Commonwealth Court of Pennsylvania. PA. STAT. ANN. tit. 77, § 871. The commonwealth court has exclusive jurisdiction of appeals from final orders of commonwealth agencies having statewide jurisdiction. 42 PA. CONS. STAT. § 763 (1981 & Supp. 1994).

18. *Latta*, 510 A.2d at 899.

19. *Latta*, 642 A.2d at 1084. The commonwealth court held that the Appellant had carried his burden of proving continuing disability with respect to the time period from October 20, 1979 until December 4, 1979, due to the fact that the final supplemental agreement covered this period. *Latta*, 510 A.2d at 898. The commonwealth court further held that the Appellant had not met his burden of proving continuing disability for the period after December 4, 1979, the end of the supplemental agreement. *Id.* at 899.

20. 522 A.2d 1108 (Pa. 1987). Allocatur is an allowance of an appeal for consideration. BLACK'S LAW DICTIONARY 75 (6th ed. 1990). Decisions of the Commonwealth Court of Pennsylvania are appealed to the Supreme Court of Pennsylvania. 42 PA. CONS. STAT. § 724.

21. *Latta*, 642 A.2d at 1084. The second petition was filed on March 27, 1987.

pellant could not perform his pre-injury employment duties; however, the examining physician concluded that the Appellant could perform light-duty work as was previously determined by the same physician shortly after the work-related injury.[22]

The referee held that the Appellant met his burden of proving his inability to continue working in his pre-injury capacity as of June 10, 1987.[23] However, any claim for benefits prior to the June 10, 1987 examination was precluded because that claim had previously been litigated.[24] The Board affirmed the referee's decision.[25] On appeal, the Commonwealth Court of Pennsylvania also affirmed.[26]

The commonwealth court determined that prior decisions in this case controlled the period from January 2, 1980 to March 3, 1983, but did not control the period between the date the record was closed and the date of the Appellant's last physical examination.[27] The commonwealth court further determined that the

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Id. The court noted that there was no indication in the record as to why the date of January 5, 1980 was chosen, because the record reflected that December 4, 1979 would have been more proper. *Id.* at 1084 n.3. The final supplemental agreement was to conclude as of December 4, 1979. *Latta*, 510 A.2d at 897.

In the hearing before the referee, the Appellant presented his own testimony as well as the deposition testimony of an expert medical witness who examined the Appellant twice. *Latta*, 642 A.2d at 1084. The first examination of the Appellant was on September 12, 1980, three years after the work-related injury occurred. *Id.* The other examination of the Appellant took place on June 10, 1987. *Id.* The second examination occurred after the first hearing in which the referee held that the Appellant's benefits could not be reinstated because the Appellant lacked the unequivocal medical evidence necessary to support a reinstatement. *Id.* This evidence was not presented at the first hearing regarding the reinstatement petition. Latta v. Workmen's Compensation Appeal Board (Latrobe Die Casting Co.), 616 A.2d 1110, 1112 (Pa. Commw. Ct. 1992), *rev'd*, 642 A.2d 1083 (1994).

22. *Latta*, 642 A.2d at 1084. The Appellant's physician determined that his work-related injury had continued as of the date of his most recent physical examination, June 10, 1987. *Id.* The date of June 10, 1987 is particularly significant due to the fact that the Appellant was examined by his physician to prove the continuation of his work-related injury and the examination took place subsequent to the previous adverse determination of the referee.

23. *Id.*

24. *Id.* The commonwealth court also noted that res judicata would preclude matters that had been or could have been litigated in prior proceedings. *Latta*, 616 A.2d at 1112. Res judicata is "[t]he rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990).

25. *Latta*, 642 A.2d at 1084. The commonwealth court held that the claimant had to produce unequivocal medical testimony to establish that a work-related injury continued. *Latta*, 616 A.2d at 1112 (citing Pieper v. Ametek-Thermox Instruments Division, 584 A.2d 301, 303 (Pa. 1990)).

26. Latta v. Workmen's Compensation Appeal Board (Latrobe Die Casting Co.), 616 A.2d 1110, 1112 (Pa. Commw. Ct. 1992), *rev'd*, 642 A.2d 1083 (1994).

27. *Latta*, 616 A.2d at 1112. The record was closed on March 3, 1983 and the

Appellant was unable to carry his burden with respect to the period between the date the record was closed and his last examination.[28] Because the Appellant failed to present unequivocal expert medical evidence to support his allegation of a continuing work-related injury, the commonwealth court concluded that he failed to satisfy the burden of proof with respect to this later period.[29]

The Appellant appealed to the Supreme Court of Pennsylvania, and the supreme court granted allocatur.[30] The issue before the supreme court was whether a claimant seeking reinstatement of suspended benefits had to present expert medical evidence which established that the original work-related injury continued.[31]

The Supreme Court of Pennsylvania[32] agreed with the commonwealth court's determination that the Appellant's expert medical evidence only supported a finding that his work-related injury continued as of the date of his most recent physical examination.[33] However, the supreme court disagreed with the commonwealth court's finding that the Appellant was unable to satisfy his burden of proof with respect to the time period from the date the record closed to the date of the Appellant's last physical examination.[34]

Appellant's last physical examination was on June 10, 1987. *Id.* The commonwealth court noted that res judicata was applicable until the date the record was closed. *Id.* The court determined that its earlier decision was controlling with respect to the time period from January 2, 1980 to March 3, 1983 due to the doctrine of res judicata. *Id.* (citing Latta v. Workmen's Compensation Appeal Board (Latrobe Die Casting Co.), 510 A.2d 896 (Pa. Commw. Ct. 1986)).

28. *Latta*, 616 A.2d at 1112.

29. *Id.*

30. *Latta*, 642 A.2d at 1084.

31. *Id.* at 1083.

32. Justice Cappy wrote the majority opinion for the Supreme Court of Pennsylvania. *Id.* Justice Zappala authored a concurring opinion. *Id.* at 1085.

33. *Id.* at 1084.

34. *Id.* The supreme court focused considerable attention on its prior decision in *Pieper v. Ametek-Thermox Instruments Division*. *Id.* (citing Pieper v. Ametek-Thermox Instruments Division, 584 A.2d 301 (Pa. 1990)). In *Pieper*, the court determined that, due to the nature of a suspension of benefits, a reduced burden of proof existed when a claimant sought reinstatement of benefits. *Latta*, 642 A.2d at 1084 (quoting *Pieper*, 584 A.2d at 304-05). Furthermore, the court in *Pieper* held that causation would be presumed when a claimant, who had previously established a work-related injury supporting a finding of disability, sought reinstatement of suspended benefits, if the claimant could demonstrate that: (1) through no fault of his own, his earning power was once again adversely affected by his disability; and (2) the disability which gave rise to his original claim, in fact, continued. *Pieper*, 584 A.2d at 301.

The supreme court noted that the commonwealth court had improperly relied on *Pieper*. *Latta*, 642 A.2d at 1084-85. Most notably, the court asserted that while

The court noted that a suspension of workers' compensation benefits indicated that a work-related injury continued, but that the claimant's earning power was not currently affected.[35] Therefore, the court explained that a claimant could satisfy his burden of proof by simply testifying that his work-related injury continued.[36] The court noted that once a claimant testified that the work-related injury continued, the burden then shifted to the employer to prove the contrary.[37] The court asserted that when the employer failed to present such evidence, the claimant's testimony, if believed by the referee, would be sufficient to reinstate the suspended benefits.[38]

Therefore, the supreme court reversed the decision of the commonwealth court and held that expert medical evidence was not required to establish that a prior work-related injury persisted.[39] During the hearing before the referee, the Appellant had testified that his injury continued from the date the record closed until the date of his last examination.[40] The court noted that the Appellant's testimony, if believed by the referee, was sufficient to support a finding that his injury continued.[41] Once the Appellant testified as to his condition, the burden then shifted to the employer to prove that the injury had ceased.[42] The court contended that no evidence was presented on behalf of the Employer to disprove the continuation of the work-related injury.[43] As a result, the Appellant's testimony, if believed by the referee, would be sufficient to support reinstatement of his benefits for the period in question.[44] Accordingly, the court reversed the decision of the commonwealth court, vacated the order of the Board, and remanded the matter to the referee to make findings

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expert medical evidence was offered in *Pieper*, its mere presence did not imply that such evidence was required to establish that a work-related injury, in fact, continued. *Id.* at 1085.

35. *Id.* Compensation is not payable when there is no loss of earning power. PA. STAT. ANN. tit. 77, § 512.

36. *Latta*, 642 A.2d at 1085. The court asserted that to hold otherwise would require the claimant to prove again that which had already been established. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Latta*, 642 A.2d at 1085. The commonwealth court would have required the Appellant to corroborate his own subjective assessment of his condition with an expert medical opinion. *See Latta*, 616 A.2d at 1112.

42. *Latta*, 642 A.2d at 1085. The opinion did not state whether the Employer would be required to present expert medical evidence to refute that the injury still existed.

43. *Id.*

44. *Id.*

as to whether Appellant's testimony was believable.[45]

In a concurring opinion, Justice Zappala remarked that on remand the Employer should be given an opportunity to introduce evidence to rebut the Appellant's testimony.[46] The concurrence asserted that it would be unjust to allow reinstatement based on the Appellant's testimony alone.[47] Justice Zappala noted that at the time of the hearing before the referee the employer was not required to introduce such evidence.[48]

In 1915, the Pennsylvania Constitution was amended to authorize the Pennsylvania General Assembly to enact laws to require employers to pay reasonable compensation for injuries to employees that arose in the course of their employment.[49] Compensation was to be paid regardless of the fault of the employer or employee.[50] The Workmen's Compensation Act, originally enacted in Pennsylvania in 1915, eliminated the employee's common law tort cause of action against the employer for alleged work-related injuries.[51] The Act represented a compromise, in that, employees gave up their right to bring a civil action against the employer and the employer gave up the right to raise such affirmative defenses as the employee's potential contributory negligence or assumption of the risk.[52]

The term "suspension" was not used in the original Workmen's Compensation Act of 1915.[53] Section 426 of the Act of 1915 provided that an agreement or award could be modified or terminated by the Board when the incapacity or disability of the claimant had changed.[54] The suspension of compensation

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45. *Id.*

46. *Id.* (Zappala, J., concurring).

47. *Latta*, 642 A.2d at 1085 (Zappala, J., concurring).

48. *Id.* at 1085-86.

49. PA. CONST. of 1874, art III., § 21 (1915).

50. *Id.*

51. 1915 Pa. Laws 338.

52. *See* David B. Torrey, *Time Limitations in the Pennsylvania Workmen's Compensation Act and Occupational Disease Acts: Theoretical Doctrine and Current Applications*, 24 DUQ. L. REV. 975, 978 (1986).

53. *See* Holtz v. McGraw & Bindley, 54 A.2d 905, 906 (Pa. Super. Ct. 1947).

54. 1915 Pa. Laws 338, § 426 (codified at PA. STAT. ANN. tit. 77, § 426 (1915), *amended by* PA. STAT. ANN. tit. 77, § 413 (1992)). Section 426 of the Act of 1915 provided:

> Any agreement or award of compensation may be modified or terminated at any time by a subsequent agreement approved by the Board, and may be modified or terminated by the Board or a referee designated by the Board, on petition of either party, on the ground that the incapacity of the injured employe has subsequently increased, decreased, or terminated, or the status of any dependent has changed.

1915 Pa. Laws 338, § 426. However, no legislative provision existed that provided for the suspension of compensation payments. *See Holtz*, 54 A.2d at 906-07.

payments began as an administrative practice of the Board when the claimant returned to light work at equivalent wages.[55] A Board rule[56] provided that where the claimant's physical impairment was not currently reflected in any loss of earning power, compensation would be suspended rather than terminated.[57] The 1919 amendments to the Act included a provision that allowed the Board the power to modify, reinstate, suspend, or terminate benefits.[58]

In 1939, the Act was once again amended and reenacted.[59] The legislature amended the Act to prevent the receipt of compensation benefits while the employee was receiving equivalent wages.[60] The first case to address the issue of whether the

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55. *See Holtz*, 54 A.2d at 907.

56. The Act of July 21, 1919 provided that, "[i]t shall be the duty of the board to make all proper and necessary rules and regulations." 1919 Pa. Laws 441, § 16.

57. *See Holtz*, 54 A.2d at 907.

58. 1919 Pa. Laws 277, § 413. Section 413 of the Act in 1919 provided:

> The board, or referee designated by the board, may, at any time, modify, reinstate, *suspend*, or terminate an original or supplemental agreement or an award, upon petition filed by either party with such board . . . shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require.

Id.

The 1939 amendment to the Act preserved the exact wording of the 1919 amendment of section 413 of the Act. *Holtz*, 54 A.2d at 907. The portion of section 413 of the Act which authorizes the Board to "modify, reinstate, suspend, or terminate" has not been changed by any amendments since 1919. *Id.* Workers' compensation laws are frequently amended to be reasonably effective and responsive to current needs. *See* BARBIERI, cited at note 3, § 2.02 at 5.

The addition of the word "suspension" to section 413 was a manifestation of the legislature's intent that a suspension is different from a termination. *See Holtz*, 54 A.2d at 907. The *Holtz* court did not rely on any authority for this assertion. Rather, it was their own interpretation of legislative intent based on the wording of section 413 of the Act.

59. 1939 Pa. Laws 281.

60. *See Holtz*, 54 A.2d at 908. The 1939 amendments altered section 306 of the Act and essentially adopted the Board's theory previously advanced by Board rule number 27. *See Holtz*, 54 A.2d at 908. Section 306 of the Act now reads:

> For disability partial in character . . . sixty-six and two thirds per centum of the difference between the wages of the injured employe, as defined in [PA. STAT. ANN. tit. 77, § 582], and the earning power of the employe thereafter . . . . *The term "earning power," as used in this section, shall in no case be less than the weekly amount which the employe receives after the injury* . . . .

PA. STAT. ANN. tit. 77, § 512 (the 1939 amendment is in italics).

The amendment and reenactment of 1939 did not change the Board's power. *See Holtz*, 54 A.2d at 908.

In 1972, the Act was again amended. *See* 1972 Pa. Laws 61. The 1972 amendment to the Act consisted of major legislative changes including entirely new procedural and administrative measures. BARBIERI, cited at note 3, § 2.02 at 5. The

Board could suspend the claimant's award when the claimant was receiving equivalent wages was *Weinstock v. United Cigar Stores Co.*[61]

In *Weinstock*, the claimant was injured while supervising a picnic given by his employer.[62] Upon returning to work, the claimant required an assistant to perform his duties; however, the claimant's wages actually increased after the work-related injury.[63] The court reasoned that earning power was to be determined by looking at a variety of factors, including wages actually received.[64] The court noted that part of the wages paid to the claimant were in appreciation for past services for the employer and, in that sense, were gratuitous and not earned as salary.[65] Therefore, the court in *Weinstock* concluded that the claimant was entitled to receive compensation, notwithstanding the fact that he was also receiving equivalent wages.[66] The

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1972 amendments have been considered the "most sweeping and most radically out of line with prior amendments." *Id.* Not only did this amendment eliminate the need for an accident, it also provided for many increases in substantive benefits. *Id.* Yet, the 1972 amendment to the Act did not change the relevant portions of sections 306 and 413 of the Act. *See* PA. STAT. ANN. tit 77, § 772.

61. 8 A.2d 799 (Pa. Super. Ct. 1939). *See also* Chubb v. Allegheny Country Club, 24 A.2d 550 (Pa. Super. Ct. 1942); Johnston v. Butler Ry. Co., 27 A.2d 785 (Pa. Super. Ct. 1942).

62. *Weinstock*, 8 A.2d at 800. The claimant fractured the upper part of his left leg and was unable to return to work for approximately five months. *Id.*

63. *Id.* The opinion does not mention why the claimant's wages were increased.

64. *Id.* at 801 (quoting Bispels v. Shoemaker, 2 A.2d 35, 36 (Pa. Super. Ct. 1938)). The court in *Bispels* stated:

> Earning power is to be determined not only by taking into account the actual amount of wages an employee receives following an injury, but also by considering the other elements affecting his earning power. Such elements include (1) the character and extent of his physical injury or disability; (2) his productivity or efficiency in the same employment as compared to what it was immediately prior to the injury; and (3) his ability to earn wages in any kind of employment for which he is fitted.

Bispels, 2 A.2d at 36.

65. *Weinstock*, 8 A.2d at 801.

66. *Id.* Although the court did not invoke any specific section of the Act, the section applicable to this case was section 306. Section 306 provides that:

> Sixty-six and two-thirds per centum of the difference between the wages of an injured employe . . . and the earning power of an employe therefore . . . The term "earning power", as used in this section, shall in no case be less than the weekly amount which the employe receives after the accident.

1939 Pa. Laws 281, § 306.

The *Weinstock* court relied on *Cavanaugh v. Luckenbach S.S. Co.* for the proposition that earnings of a claimant after the accident were but evidence of a change in earning power and that the earnings were not conclusive on the matter. *Weinstock*, 8 A.2d at 801 (quoting Cavanaugh v. Luckenbach S.S. Co., 189 A. 789, 791 (Pa. Super. Ct. 1937)).

The *Weinstock* court also relied on *Bispels v. Shoemaker* for the proposition

court further concluded that the claimant's salary was not reduced to reflect the loss of earning power.[67] The Superior Court of Pennsylvania therefore determined that the simultaneous receipt of equivalent wages and compensation benefits was permissible.[68]

The issue of whether the Board could suspend compensation benefits until the claimant lost earning power arose again in *Scipani v. Pressed Steel Car Co.*[69] In *Scipani*, the claimant injured his hand while in the scope of his employment, but returned to work at wages that were not less than his pre-injury wages.[70] The court asserted that the 1939 amendments to section 306 and section 403 of the Act referred to the actual amount of wages received subsequent to the injury.[71] The superior court determined that the 1939 amendments directed that no compensation was payable when an employee, subsequent to the injury, received wages equal to the pre-injury wages.[72]

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that earning power was to be determined by considering a variety of elements affecting earning power, not only the actual amount of earnings received subsequent to the injury. *Weinstock*, 8 A.2d at 801 (quoting *Bispels*, 2 A.2d at 36).

67. *Weinstock*, 8 A.2d at 801.

68. *Id.* at 800.

69. 28 A.2d 502 (Pa. Super. Ct. 1942).

70. *Scipani*, 28 A.2d at 503-04. This occurred even though the court determined that the claimant was partially disabled. *Id.*

In the accident, the bones of the claimant's thumb and middle finger were fractured. *Id.* at 503. The claimant also lacerated two fingers and the palm of his hand. *Id.* The result of the accident was limited flexion of the thumb, index, and middle fingers. *Id.* According to medical testimony, the claimant suffered a loss of approximately one-third of the efficiency of his right hand. *Id.*

71. *Id.* at 504. See note 60 for the text of section 306. See note 58 for the text of section 413.

72. *Scipani*, 28 A.2d at 504. The court further held that it was error to suspend payments where the claimant's loss of earnings was caused by economic conditions and other matters not related to the claimant's physical impairment. *Id.* The court was referring to weather conditions and reductions in the employer's work force due to economic reasons. *Id.* Furthermore, it was apparent that when a claimant was disabled, economic matters or other matters not related to the claimant's physical impairment could cause the claimant's disability to subsequently be reflected in loss of earning power so as to prevent continued suspension of benefits. *Id.* A claimant who was partially disabled and returned to work in a light-duty capacity might not have had his disability reflected in a loss of earning power due to the fact that the claimant was receiving wages equivalent to his pre-injury wages. *Id.* Therefore, it was possible that a downturn in the economy (i.e. an economic matter or a matter not related to the claimant's physical impairment) could cause the employer to eliminate the claimant's position in reducing its work force. *Id.* As a result, the claimant's current wages would fall below his pre-injury wages. *Id.* Such a reduction in wages caused the claimant's disability to be reflected in the claimant's loss of earning power. *Id.* When the claimant's current earnings were less than the claimant's pre-injury wage, there could be no suspension of compensation benefits. *Holtz*, 54 A.2d at 909. Further, when a suspension could not be effectuated, the original agreement or award was reinstated and remained in effect, subject only to

Thus, the court in *Scipani* established that the 1939 amendments to section 306 and section 413 prevented the simultaneous receipt of compensation benefits and post-injury wages that were equivalent to pre-injury wages.[73]

The original rule regarding the burden of proof in workers' compensation cases was first announced by the superior court in *Consona v. Coulborn & Co. (Royal Indemnity Co.).*[74] In *Consona*, the issue was whether proof of job availability was necessary when the claimant could perform light work.[75] The claimant was injured in the course of his employment when a block hit him in the head.[76] Due to the fact that the claimant could only perform light work at irregular intervals, the court determined that it would not be practicable to expect that he could hold a job, and no evidence of job availability was offered to the referee by either party.[77] Therefore, the court upheld the Board's decision concluding that the claimant was totally disabled.[78] In so holding, the court asserted that where a claimant was able to perform light work, "it might be presumed that work of that nature would be available."[79] Thus, the *Consona* court contended that the burden of proof was on the claimant when the claimant was able to perform light work.[80]

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modification upon a showing of change in disability or earning power. *Id.*

Thus, the legislature and the courts devised a new compensation status, termed "suspension." *See* Appellant's Brief at 10, *Latta v. Workmen's Compensation Appeal Board (Latrobe Die Casting Co.)*, 642 A.2d 1083 (Pa. 1994) (No. 0032 W.C.). The suspension status is measured in terms of earnings instead of earning power and its effect is to cause the discontinuance of compensation payments because of changes in post-injury wages, not because of changes in disability. Appellant's Brief at 10.

73. *Scipani*, 28 A.2d at 503-04. The Act was again amended in 1945, with no changes or amendments to the relevant portions of section 306 or section 413. *See Holtz*, 54 A.2d at 908. The relevant portions of section 306 and section 413 currently remain in effect. *See* PA. STAT. ANN. tit. 77, §§ 512, 772.

74. 158 A. 300 (Pa. Super. Ct. 1932).

75. *Consona*, 158 A. at 300-01.

76. *Id.* The claimant's injuries consisted of a fractured skull, jaw, and nose as well as lacerations and a badly bruised shoulder. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 300.

80. *Consona*, 158 A. at 300. The identical issue of whether proof of job availability was necessary when it was established that the claimant was able to perform light work was decided in *Earley v. Philadelphia & Reading Coal & Iron Co. See* Earley v. Philadelphia & Reading Coal & Iron Co., 19 A.2d 615 (Pa. Super. Ct. 1941). In *Earley*, the claimant sustained a work-related injury when a coal chute hit him. *Earley*, 19 A.2d at 615. The claimant fractured the first lumbar vertebra in the accident. *Id.* The court reasoned that when a claimant suffered a work-related injury and remained able to perform light work there was a presumption of job availability. *Id.* at 617. The superior court held that the burden of proof was on the claimant to prove that no such light work existed which the claimant, considering the claimant's

In *Petrone v. Moffat Coal Co.*,[81] the Supreme Court of Pennsylvania addressed the issue of whether a claimant was entitled to compensation for total disability where he could adequately perform light-duty work and where no evidence was presented that light work was available.[82] In *Petrone*, the claimant provided medical evidence establishing that he could no longer perform his pre-injury duties.[83] However, no evidence was presented that demonstrated the availability of any light work that the claimant could perform.[84] The court determined that it was easier for the employer to prove that such light work existed than for the claimant to prove its non-existence.[85]

The *Petrone* court noted that the presumption of job availability for claimants who were able to perform light work, created by the *Consona* and *Earley* decisions, was unnatural and illogical.[86] The court held that once a claimant proved that the claimant's pre-injury work could not be performed, the burden of proof shifted to the employer to prove the existence of light work which the claimant could perform.[87] The court further opined that if an employer could not satisfy the requisite burden, the claimant was entitled to compensation benefits for total disability.[88] Thus, the *Petrone* court placed the burden of proving job availability on the employer.[89]

In *Barrett v. Otis Elevator Co.*,[90] the Supreme Court of Pennsylvania addressed the issue of whether the *Petrone* decision should be extended to place the burden of proving the availability of any type of work on the employer.[91] In *Barrett*, the claimant was injured as a result of an accident that occurred in the

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education and experience, could perform. *Id.* Thus, the *Earley* court extended the *Consona* rule to a definite presumption that light work was available and that the claimant could procure such work. *Id.*

81. 233 A.2d 891 (Pa. 1967).

82. *Petrone*, 233 A.2d at 892. The *Petrone* court also noted that the claimant's educational and vocational background were at issue when considering whether the claimant was entitled to benefits while he could adequately perform light work, but no evidence of job availability was presented. *Id.*

83. *Id.*

84. *Id.* at 894-95. The claimant was diagnosed with having anthracosilicosis which was common among coal miners. *Id.* at 892. The claimant's examining physician concluded that the claimant could no longer work in the coal mines or compete in the general labor market, but he could perform light-duty work of a general nature. *Id.*

85. *Id.* at 895.

86. *Id.* at 894.

87. *Petrone*, 233 A.2d at 895.

88. *Id.* at 895.

89. *Id.* at 894-95.

90. 246 A.2d 668 (Pa. 1968).

91. *Barrett*, 246 A.2d at 671.

course of his employment.[92] After considering the conflicting testimony of four medical doctors, the Board found the claimant to be partially disabled.[93] The claimant, on appeal, argued that the finding of partial disability should not be sustained due to the absence of evidence as to the availability of work within the claimant's physical limitations.[94] The issue was whether the employer had the burden of proving that work existed that the claimant could perform in order to sustain the finding of partial disability.[95] The court held that once a claimant proved the inability to return to pre-injury work, the employer had the burden of proving that other work was available which the claimant was capable of obtaining.[96]

In shifting the burden, the *Barrett* court relied on the proposition that the burden of proof could be placed on the party trying to prove the existence of a fact instead of on the party trying to prove its non-existence.[97] The *Barrett* court also noted that it was more difficult to prove that no jobs were available than to prove that a job was available.[98] The court further observed that by placing the burden on the employer, agreements between employers and employees who suffered temporary total disability would become more attractive.[99] The *Barrett* decision extended the *Petrone* decision and placed the burden of proving the availability of any type of work on the employer.[100]

In *Cerny v. Schrader & Seyfried, Inc.*,[101] the Supreme Court of Pennsylvania established the burden of proof that was required of a claimant in a modification proceeding.[102] After incurring a work-related injury which prevented the claimant from returning to his old position, the claimant returned to work in a light-duty position.[103] At the end of the partial disability payment period, the claimant petitioned to modify his compensation benefits from partial disability to total disability.[104] The Board,

92. *Id.* at 669.
93. *Id.*
94. *Id.* at 671.
95. *Id.*
96. *Barrett*, 246 A.2d at 674.
97. *Id.* at 673 (quoting 9 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2486 (1940)).
98. *Barrett*, 246 A.2d at 673.
99. *Id.* at 674.
100. *Id.* The case was remanded to the Board for a hearing and findings pursuant to the burden of proof as defined by the supreme court in that opinion. *Id.*
101. 342 A.2d 384 (Pa. 1975).
102. *Cerny*, 342 A.2d at 385.
103. *Id.* A sewer trench in which the claimant was working collapsed upon him. *Id.* However, after returning to work, the claimant was subsequently laid off. *Id.* The court did not indicate why the claimant was laid off.
104. *Id.* The claimant petitioned for modification under Section 413 of the Act.

relying on *Barrett*, awarded the claimant total disability because the employer had failed to prove light work was available which the claimant was capable of performing.[105] The commonwealth court reversed the Board's decision and held that the claimant had failed to establish an increase in disability.[106]

The Supreme Court of Pennsylvania vacated the order of the commonwealth court, and held that the same allocations of burdens of proof as set forth in *Petrone* and *Barrett* should apply to modification proceedings.[107] The court asserted that when a claimant alleged total disability in a modification proceeding, the claimant had to prove both an increase in disability and an inability to perform his previous employment duties.[108] The court in *Cerny* concluded that medical proof of a change in disability was required to modify an award or supplemental agreement.[109] The court determined that if the employee met this burden, the burden of proof then shifted to the employer.[110] The court asserted that a finding of total disability would be warranted unless the employer established that work was available that the claimant could perform.[111]

The issue of whether medical proof regarding changes in disability was necessary in a reinstatement proceeding was addressed by the commonwealth court in *Busche v. Workmen's Compensation Appeal Board (Townsend & Bottum, Inc.)*.[112] In *Busche*, the claimant was awarded total disability for a heart attack, but subsequently returned to work in a light-duty capacity, which resulted in a suspension of benefits.[113] The claimant's

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Id.; *see* PA. STAT. ANN. tit. 77, § 772.

105. *Cerny*, 342 A.2d at 386.

106. *Id.*

107. *Id.* at 386-87.

108. *Id.* at 387. In so holding, the *Cerny* court relied on section 413 of the Act and on the decisions in *Barrett* and *Petrone*. *Id.* at 386.

109. *Id.* at 386-87. Because neither the referee nor the Board had determined whether the claimant had established an increase in his disability (at each level the determination was made based upon the availability of light work), the supreme court vacated the order of the commonwealth court and remanded the case to the Board to determine whether an increase in the claimant's disability had been established. *Id.* at 387.

110. *Cerny*, 342 A.2d at 387.

111. *Id.*

112. 466 A.2d 278, 280 (Pa. Commw. Ct. 1983). *See also* Venanzio v. Workmen's Compensation Appeal Board (Eastern Express), 489 A.2d 284 (Pa. Commw. Ct. 1985); Smith v. Workmen's Compensation Appeal Board (Futura Industries), 471 A.2d 1304 (Pa. Commw. Ct. 1984).

113. *Busche*, 466 A.2d at 278-79. The claimant suffered the heart attack when lifting heavy cylinders weighing approximately one hundred and fifty pounds. *Id.* at 278. As a result of the heart attack, the claimant underwent coronary bypass surgery. *Id.* Although the claimant remained disabled, he returned to work in a light-

light-duty job was subsequently eliminated by the employer, without finding other employment for the claimant.[114]

The commonwealth court asserted that the claimant's only burden in a reinstatement proceeding was to prove that the specially created position had been discontinued.[115] Thus, the court reasoned that the claimant simply had to show that his disability had continued and a loss of earnings had recurred.[116] The court held that medical proof of a change in disability was not necessary in a reinstatement proceeding.[117]

The Supreme Court of Pennsylvania addressed the issue of the evidence necessary to support a petition for reinstatement of benefits in *Pieper v. Ametek-Thermox Instruments Division*.[118] In *Pieper*, the claimant suffered a lower back injury during the course of his employment.[119] The claimant's benefits were subsequently suspended upon his return to full-time employment.[120] While the claimant's benefits were under suspension, the claimant was laid off and, therefore, petitioned for reinstatement of his benefits.[121] The referee found that the claimant was totally and permanently disabled and reinstated his compensation benefits.[122] The Board found that the referee's decision was supported by competent evidence.[123] The Common-

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duty position created for him by the employer. *Id.* The claimant's compensation payments were suspended upon his return to work. *Id.*

114. *Id.* at 279.

115. *Id.* at 280.

116. *Id.* at 281.

117. *Id.* at 280. The commonwealth court reversed the Board and remanded for an order reinstating compensation payments. *Id.* at 280-81.

118. 584 A.2d 301 (Pa. 1990). The court reviews a board order to determine whether there has been a constitutional violation, an error of law, or a violation of procedure, and whether the necessary findings of fact are supported by substantial evidence. *Pieper*, 584 A.2d at 303 (quoting 2 PA. CONS. STAT. § 704 (Supp. 1994)).

119. *Pieper*, 584 A.2d at 302. The claimant was paid temporary total disability benefits for a herniated disk until he returned to work and executed a "final receipt." *Id.* The claimant then suffered a recurrence of the injury and his compensation benefits were reinstated by a supplemental agreement. *Id.* The claimant then returned to work on a part-time basis, receiving partial disability benefits. *Id.*

120. *Id.* The claimant petitioned for reinstatement of benefits which were previously "terminated" by a supplemental agreement, because he returned to full-time work. *Id.* at 305.

121. *Id.* at 302. The claimant received unemployment compensation benefits for twenty-six weeks. *Id.* During the time the claimant was receiving unemployment benefits, he did not receive worker's compensation benefits. *Id.*

122. *Id.* at 303.

123. *Id.* The Board found that the referee's decision was supported by competent evidence based upon the following: (1) the claimant's testimony; (2) the supplemental agreements; (3) the claimant's back operation to improve his disability; and (4) the testimony of the claimant's treating physician. *Id.* The Board recognized that the testimony of the claimant's physician concerned the continuation of the claimant's work-related injury rather than its causation. *Id.* However, the Board

wealth Court of Pennsylvania then reversed the decision of the Board.[124]

On appeal, the Supreme Court of Pennsylvania held that to reinstate suspended benefits, the claimant was only required to show that the reasons for the suspension no longer existed.[125] The court asserted that the claimant had sufficiently established, by medical testimony, that his disability continued.[126] The supreme court concluded that the testimony of the claimant's examining physician was sufficient to establish the continuation of the claimant's work-related injury, and asserted that, in the absence of evidence of availability of other employment, the claimant was entitled to have his suspension lifted, thereby reversing the commonwealth court.[127]

In addressing the issue of whether a claimant seeking reinstatement of suspended benefits was required to present expert medical evidence, the Pennsylvania Supreme Court, in *Latta*, concluded that such evidence was not necessary to support a reinstatement of benefits.[128] The *Latta* court held that after a claimant testified that the work-related injury continued, the

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found that the evidence in its entirety was adequate to support the referee's decision to reinstate benefits. *Id.*

124. *Pieper*, 584 A.2d at 303. The commonwealth court held that the necessary finding of causation was not supported by substantial evidence. *Id.* The commonwealth court, therefore, applied the standard corresponding to a termination of benefits. *Id.* at 305. The claimant was required to show that there was a causal connection between the work-related injury and his present disability. *Id.* at 305-06.

125. *Id.* at 304. The supreme court noted that many months or years could pass before an economic condition would force a claimant to apply for reinstatement of benefits. *Id.* at 305. Therefore, in order for the claimant to prove that the reasons for the suspension no longer existed, the claimant was required to prove that his earning power was once again adversely affected by his disability through no fault of his own. *Id.* Furthermore, the claimant was required to prove that the original disability continued. *Id.*

126. *Id.* at 308. The claimant was also found to have established that his earning power was once again adversely affected by his disability due to the fact that the claimant was no longer receiving unemployment compensation. *Id.* Therefore, the supreme court reversed the decision of the commonwealth court and reinstated the decision of the Board, which reinstated the claimant's benefits. *Id.*

127. *Id.* at 306. See note 36 for a discussion of the *Latta* court's interpretation of this proposition. The supreme court also noted that the claimant's benefits were suspended and, therefore concluded that the commonwealth court committed an error of law in applying the standard for termination of benefits rather than the standard for a suspension of benefits. *Id.* The *Pieper* court noted that the causal connection between the original work-related injury and the claimant's disability was presumed when a claimant petitioned for reinstatement of suspended benefits. *Id.* at 305. Thus, the claimant was only required to show that his disability continued and his loss of earnings recurred. *Id.* The *Pieper* court relied, in part, upon the *Busche* decision for this proposition. *Id.* See notes 112-17 and accompanying text for a discussion of the *Busche* decision.

128. *Latta*, 642 A.2d at 1083.

burden shifted to the employer to prove the contrary.[129] The court's decision evolved, in part, from the decisions in *Busche* and *Pieper*.

Pursuant to the persuasive authority of *Busche*, *Pieper* and *Latta*, a claimant seeking to reinstate benefits, currently under suspension, has the burden to show, by the claimant's testimony alone, that the claimant's disability, in fact, continues.[130] Once the claimant effectively demonstrates that the disability continues, the burden of proof is then shifted to the employer to prove the contrary.[131] When an employer fails to prove that the claimant's work-related injury has not continued, the claimant's testimony alone is sufficient to support reinstatement of the suspended benefits.[132]

The importance of this decision is clear. By removing the burden of establishing the continuance of a work-related injury by introducing medical evidence, the supreme court has opened the door to many more claimants who previously would not have been able to satisfy the heavy burden. Further, by placing the burden of proof on the employer, the supreme court has effectively encouraged an increase in the use of supplemental agreements.

Although a suspension status acknowledges a continuing work-related injury, the claimant's benefits are suspended because the claimant's earning power is not currently affected by the injury.[133] A claimant who is currently under a suspension status has already established a work-related injury which would support an award of workers' compensation benefits. To hold that a claimant needs to prove the continuation of the work-related injury by providing expert medical evidence would require a claimant to re-establish a proposition which has already been established, agreed to, and acknowledged.

The *Latta* decision is equitable to the claimant.[134] First, a claimant would shoulder a heavy financial burden if the claimant were required to present expert medical evidence of the continuation of the work-related injury. Not only would the claimant have to incur expenses for an examination by a physician and the physician's preparation of a report, the claimant

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129. *Id.*
130. *See Latta*, 642 A.2d at 1085.
131. *Id.*
132. *Id.*
133. *Id.*
134. The Workers' Compensation Act is remedial in nature and was intended to be liberally construed so as to effectuate the basic social and remedial purposes of the Act. BARBIERI, cited at note 3, § 2.08 at 11.

would also have to pay for the deposition testimony of the examining physician, which is often far more expensive than the exam and report. Second, it would appear that employers are in a better financial position to assume this cost. Finally, placing the burden to prove the non-existence of the work-related injury on the employer eliminates the employer's incentive to contest the reinstatement of the claimant's benefits where the employer anticipated the financial inability of the claimant to provide the necessary evidence, thereby making supplemental agreements more attractive.

The Supreme Court of Pennsylvania provided a safeguard to the employer by requiring that the claimant's testimony must be believed by the referee.[135] Therefore, credibility plays an integral role in the reinstatement process. In fact, an employer may not even need to present evidence if the referee does not believe the claimant's testimony.[136]

The *Latta* decision, however, becomes more unfavorable to the employer with the passage of time between the initial suspension and subsequent reinstatement. Where a short period of time elapses between the suspension and reinstatement, determining whether the injury has continued would be straightforward.[137] However, the longer the passage of time between the suspension and reinstatement, the less obvious it is that the injury has continued.[138] When a significant amount of time elapses between the suspension and reinstatement, shifting the burden of proof to the employer may be unfair.

The supreme court's holding in *Latta* will most likely be modified or limited in application to address the problems presented with the increased passage of time between the suspension and reinstatement. The Supreme Court of Pennsylvania, in both *Latta* and *Pieper*, acknowledged the increasingly difficult burden of proof placed on the employer with the passage of time between the initial suspension and subsequent reinstatement pro-

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135. *See Latta*, 642 A.2d at 1085.

136. The Supreme Court of Pennsylvania, in *Latta*, never specified what evidence would be required of the employer to prove the non-existence of the work-related injury. *See Latta*, 642 A.2d at 1085. However, it can probably be presumed that expert medical evidence would not be required, especially in light of the fact that before the burden was shifted to employers by *Latta*, the claimant was not required to provide such medical evidence. *See Busche*, 466 A.2d at 280 (holding that medical proof of change in disability was not required in a reinstatement proceeding); *Latta*, 642 A.2d at 1084-85 (interpreting *Pieper* as to not require medical proof of the continuation of the claimant's work-related injury in a reinstatement proceeding).

137. *See Latta*, 642 A.2d at 1085 n.4.

138. *Id.*

ceeding.[139] It is apparent that this recognition by the supreme court is, in effect, notice of an impending modification or limitation of the current precedent set by *Latta*.[140]

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139. *See Latta*, 642 A.2d at 1085 n.4; *Pieper*, 584 A.2d at 305.

140. The supreme court in *Latta* also cleared some apparent confusion as to the applicability of the doctrine of res judicata. *See* Referee's Decision, *Latta v. Latrobe Die Casting Co.*, File No. 44886 & 45792 (1989) (asserting that res judicata was applicable up to the time of the second physical examination which was subsequent to the date of the closing of the record). The *Latta* court concluded that res judicata was applicable up to the date the record was closed in a workers' compensation case. *Latta*, 642 A.2d at 1084.